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CHARLES ELMER CAGLEY
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Supreme Court of the United States

October Term, 1943.

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No.

NEW YORK STATE GUERNSEY BREEDERS'
CO-OPERATIVE, INC.,

Petitioner,

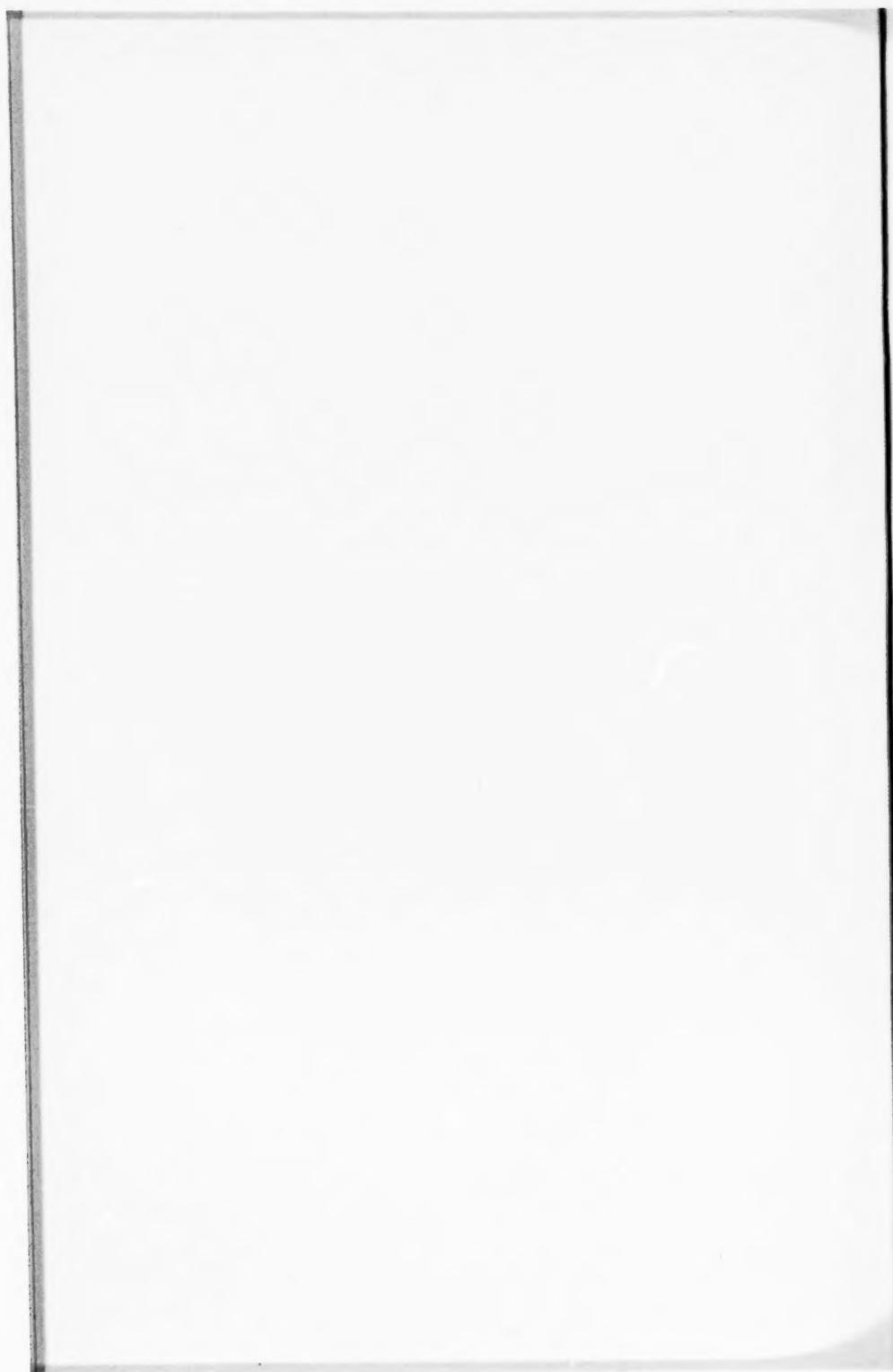
against

CLAUDE R. WICKARD, Secretary of Agriculture of
the United States of America.

PETITION FOR WRIT OF CERTIORARI TO THE CIR- CUIT COURT OF APPEALS, SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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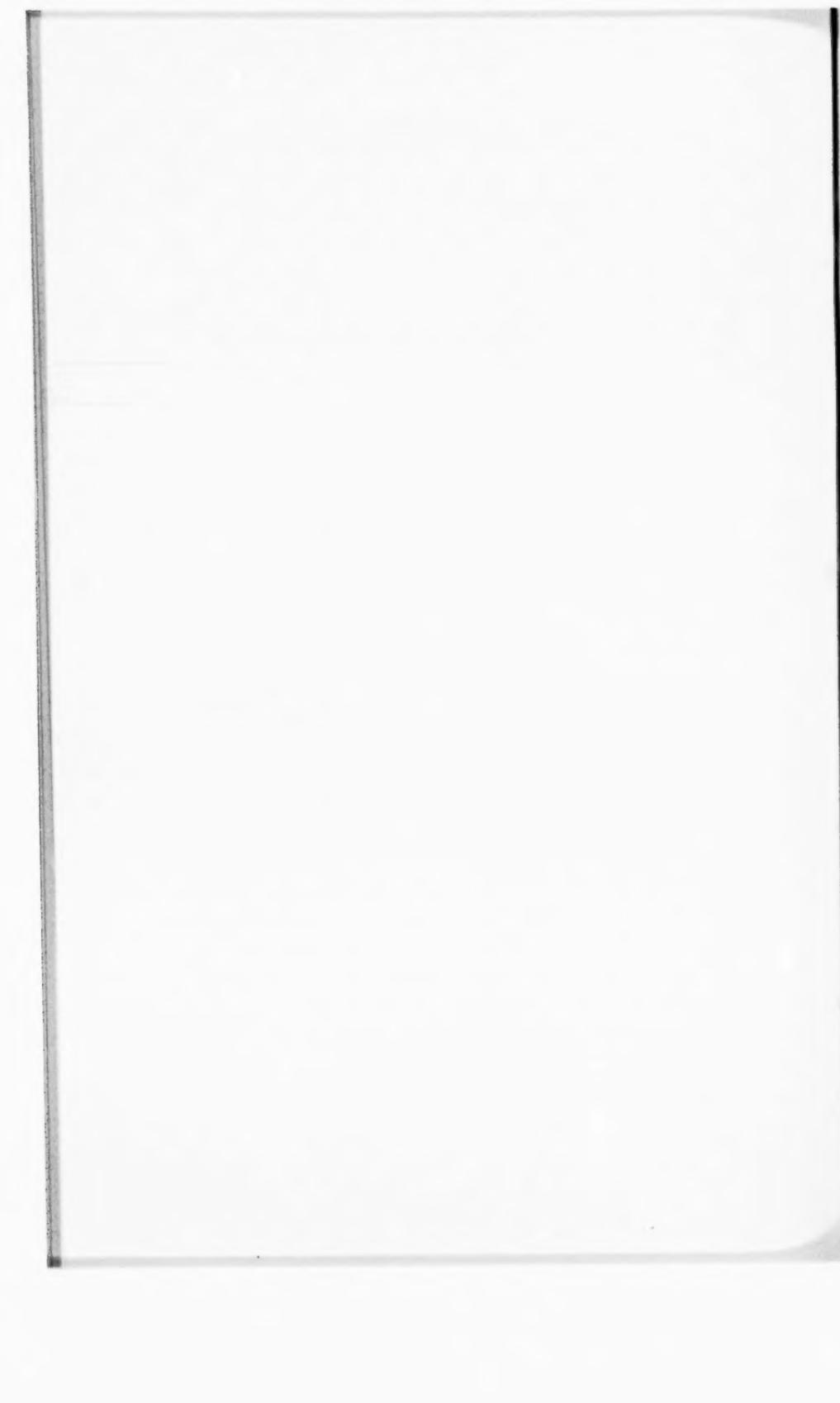
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No. _____

NEW YORK STATE GUERNSEY BREEDERS'
CO-OPERATIVE, INC.,

Petitioner;

against

CLAUDE R. WICKARD, Secretary of Agriculture of
the United States of America.

*To the Chief Justice and Associate Justices of the Supreme
Court of the United States:*

The petitioner above-named, represented by Merritt A. Switzer, its attorney, respectfully prays that a writ of certiorari be issued from the Supreme Court of the United States, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket No. 244, October Term, 1943, New York State Guernsey Breeders' Co-operative, Inc., plaintiff-appellant, v. Claude R. Wickard, Secretary of Agriculture of the United States of America, defendant-appellee, and that the judgment of

the Circuit Court of Appeals and the judgment of the District Court may be reviewed and reversed, and that the petitioner may have such other and further relief as may be just and proper.

Statement of the Case.

This suit was brought by petitioner by a bill in equity to review a ruling of the Secretary of Agriculture denying its petition for relief from the equalization provisions of Order No. 27, issued by the Secretary, regulating the handling of milk in the New York milk marketing area, or for an amendment to the order providing for a differential in its favor. The petitioner bases its claim for relief upon the fact that it is a co-operative association of farmers producing milk from Guernsey herds which it sells in that marketing area, that the milk which it sells is of a superior quality not adequately compensated for under Order provisions, and that an adjustment for the "grade or quality of the milk delivered" by it should have been made.

The issues presented by the original complaint, answer and reply were heard on motions for summary judgment. The District Court, Northern District of New York, Hon. Frank Cooper, D. J., handed down an opinion (R. 19-78) upon which findings of fact and conclusions of law (R. 79-106) and an order denying motions for summary judgments and remanding the matter to the Secretary of Agriculture (R. 107-110) were filed. A reopened hearing was held before a duly designated representative of the Secretary and thereafter a decision was handed down by the Secretary, again denying plaintiff's petition. An amended and supplemental complaint (R. 182-222) was served, which was met by an answer to amended and supplemental complaint

(R. 223-258), a reply was served (R. 272-291), and upon motions for summary judgment the matter was heard before Hon. Frederick H. Bryant, D. J., the decision being for the defendant. Findings of fact and conclusions of law were made (R. 319-333) and a final judgment (R. 334-341) was entered. Upon appeal by the plaintiff (R. 341-343) the Circuit Court of Appeals affirmed.

Opinions Below.

The opinion of Cooper, D. J., is unreported but is printed in the record (R. 19-78). The opinion of Bryant, D. J., (R. 291-318) is likewise unreported. The opinion of the Circuit Court (R. pp. 135-145) is reported in 141 Fed. 2d 805.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 17, 1944, (R. pp. 146-147). The jurisdiction of the Supreme Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C. A., Title 28, Sect. 347).

Statutes Involved.

The Federal Act directly involved is the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601 *et seq.*, and particularly 608e thereof, which provides in part, as follows:

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. * * *

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof . . . or to any regional or market classification of any such commodity or product: Milk, * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing minimum prices for each such use classification which all handlers shall pay and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: subject, in either case, only to adjustments for (a) volume, market and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

Also involved are Sects. 698c (15)(A) and (B) and (18) which provide as follows:

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States * * * in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, * * *. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. * * *

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, shall ascertain * * * the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices * * * shall, for the purposes of such agreement, order or amendment, be such level as will reflect the price of feeds, the available supplies of feed and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the * * * order or amendment relates. * * * he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. * * *

Summary Statement of Matters Involved.

The Secretary of Agriculture, acting under powers conferred by Section 608e, on Aug. 5, 1938, issued Order No. 27, regulating the handling of milk in the New York milk marketing area. Petitioner is a co-operative association of dairy farmers producing milk from Guernsey herds, which it markets in the marketing area. At promulgation hearings held prior to the issuance of the order, the petitioner, believing itself entitled to an adjustment for "the grade or quality of the milk" sold by it, petitioned for relief from the equalization provisions of the proposed order or for an amendment providing for a differential in its favor. The order as promulgated contained no provision making any adjustment for quality other than a butterfat differential and a Grade A premium, which latter premium was afterwards discontinued. After promulgation of the order and a demand for a large amount claimed by the Market Administrator to be due the producer-settlement fund on milk handled by it during the first month the order was in effect, it petitioned under Section 608e (15)(A), praying for a modification of the order or exemption therefrom. Hearings were held and its petition denied. It thereupon commenced this action pursuant to Section 608e (15) (B).

Issues presented by the original complaint, answer, counterclaim and reply were heard before Honorable Frank Cooper, United States District Judge, on motions for summary judgment. Findings were made sustaining petitioner's contention that its milk is of a superior quality, not adequately compensated for under Order provisions, and the court concluded as a matter of law that the Secretary's findings and conclusions were not in accordance with the evidence at the hearing before him, and that upon the evi-

denee and according to law the Secretary should have made an adjustment, by exemption or differential, which would adequately recognize the quality of petitioner's milk.

The matter was remanded to the Secretary to make new findings of fact and conclusions upon the evidence and to grant or deny plaintiff's proposed findings and conclusions, with the right to make new or additional findings, and with the right of each party to submit additional evidence.

After entry of judgment based upon such findings and conclusions of law, the Secretary held further hearings and made another determination again denying petitioner's claim for a differential. Thereupon, by order of the District Court, petitioner was permitted to serve an amended and supplemental complaint. The Secretary served an answer to the amended and supplemental complaint which contained an amended and supplemental counterclaim, a reply was served by the petitioner, and the matter was heard before Honorable Frederick H. Bryant, United States District Judge, again upon motions for summary judgment. He found in favor of the Secretary and made an order dismissing the amended and supplemental complaint.

The Secretary's counterclaim is for moneys claimed to be due the producer-settlement fund on milk on which petitioner believes itself entitled to an adjustment for quality. It is on deposit subject to court order pending termination of this litigation and Judge Bryant granted judgment directing payment of such money to the Market Administrator.

Petitioner appealed to the Circuit Court. That Court has affirmed the decision of the District Court.

Question Presented.

Does the refusal of the Secretary to provide an appropriate adjustment or differential in favor of petitioner to compensate it for the grade or quality of the Guernsey milk it delivers or to relieve the petitioner from the equalization provisions of Order No. 27 constitute a violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States or is such refusal otherwise contrary to law?

Reasons Relied on for Allowance of the Writ.**A.**

The courts below have decided such constitutional question in the negative. In so doing they have indicated that they consider themselves bound by the decision of this Court in United States vs. Rock Royal Co-op., Inc., 307 U. S. 533, thereby giving to that decision an effect beyond the scope of the issues there determined.

B.

It is the contention of the petitioner that it is entitled under the Act to the benefit of an Order provision which will allow it adequate compensation for the quality of its product, and that if the Act does not require the inclusion of such a provision in the Order, then, as to it, the Act itself is unconstitutional and void as depriving it of property without due process of law. This is an issue hitherto undetermined by this court with respect to the Act in question or the Order which has been promulgated under the asserted authority of the Act.

C.

The courts below have assumed a state of facts wholly unwarranted by the evidence and upon the basis of that assumption have rendered decisions which tend to nullify the purposes of Congress in providing control legislation with respect to the marketing of milk. So zealous have the courts been in attempting to sustain the order of the Secretary and his determinations with respect to the legality thereof that they have lost sight of the fact, long recognized by this court, that "differentials for quality" are contemplated (United States v. Rock Royal Co-op., 307 U. S. 533 at p. 571) and that prices must be determined which take into account the "price and supply of feed and other pertinent economic conditions" and which "give such commodities a purchasing power equivalent to their purchasing power during the base period" (608e (18)). The base period was fixed by the terms of the order as Aug. 1921-July, 1929, pursuant to Sections 602 and 608e of said Act.

D.

The decision of the Circuit Court herein is directly contrary to decisions of the Court of Appeals of the State of New York upon a state of facts and under Order provisions alike in all material respects.

New York State Guernsey Breeders' Co-operative, Inc. v. Noyes, 284 N. Y. 197;

New York State Guernsey Breeders' Co-operative, Inc. v. Noyes, 266 App. Div. 462, App. dismissed, 291 N. Y. 704.

BRIEF SUPPORTING PETITION.**Introduction.**

The dairy problem of New York State has been a matter of public and legislative concern for many years. This court is already familiar with the problems of the milk industry and has treated many of its different phases.

Nebbia v. New York, 291 U. S. 502;

Baldwin v. Seelig, 294 U. S. 511;

Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251;

Hegeman Farms Corporation v. Baldwin, 293 U. S. 163.

Those cases arose before milk marketing orders promulgated under the provisions of the Agriculture Marketing Agreement Act of 1937. Several issues born of these orders, too, have passed before this Court. In all of these cases, however, the issue of this case has not been considered. The petitioner does not attack Order No. 27; it does not attack the order method of marketing milk. It seeks to have corrected inequalities arising between a minority group and the majority group under the operation of a milk marketing order. It is an endeavor to correct inequalities which have arisen between producers under the operation of a milk marketing order. Petitioner claims that it is entitled to a differential in its favor to compensate it to some extent for the "grade or quality of its milk."

In *United States vs. Rock Royal Cooperative, Inc.*, 307 U. S. 533, extensive briefs were filed by the United States. One statement contained in the brief on behalf of the United States clearly analyses the nature of the grievances to which we are here seeking to direct the attention of this court. At page 126 of the United States brief in the Rock

Royal case, in general justification of the equalization provisions of the order, the government said:

"The equalization payments are essentially fair because they provide for a mutuality of burdens and benefits. Their effect is to give all producers a share of the valuable fluid milk market commensurate with the quantity of milk they deliver and at the same time to enable all producers to bear equally the burdens incident to the inevitable and necessary surplus. A statutory provision which treats all producers with equal fairness, assures them a stable price, protects them from the hazards which have proved so harmful to their welfare in the past, and distributes the necessary burdens of the business equally and fairly among them all does not violate the due process clause of the Fifth Amendment."

But at page 60 and 61 of the same brief, in a justification of payment in excess of the equalized price to producers covering local differentials, the government also said:

"The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential."

Petitioner claims that it also has always enjoyed an almost exclusively fluid market, not by reason of accident of competition but by reason of natural advantages inherent in its product, and hence that it is deprived of its property without due process of law when required to market this product on an equalized basis without regard to the grade or quality of its product and without just compensation by way of a differential.

A. Equalization in secretary's order No. 27 deprives petitioner of property without due process of law.

1. PROPERTY RIGHTS INVOLVED IN PRODUCTION OF GUERNSEY MILK.

The production of Guernsey milk today is the result of costly concern for the careful breeding of herds and a planned evolution of the high test dairy cow. It is the product of sizeable investments in equipment and of expensive herds formed and improved through the persistence of farmers endeavoring to offer something better on the milk market. That market has been developed through vigorous advertising, an expense incurred and designed to yield long term profit.

Guernsey milk's high butterfat, yellow color, richness in protein and minerals are upheld through heavier stoking of feed per unit of milk produced.

"It is an established fact that feed costs and other expenses of production are greater per hundred weight for high-test milk than for milk of lower fat content. According to the Morrison Feeding Standards for dairy cows, it takes about 7 pounds more of total digestible nutrients to produce 100 pounds of 4.5 per cent milk than to produce the same quantity of 3.5 per cent milk."¹

In addition to investment, maintenance, and current feeding and care costs, and as their result, the contents of Guernsey milk represent special property rights of the petitioner. Of 100 pounds of average milk, 87 are water, and the remaining 13 are milk solids. These are butterfat, protein, milk sugar, and minerals. Guernsey and Jersey stock have raised that weight of milk solids to as high as 17.9 pounds per hundred. The portion of butterfat is

¹ Spencer & Johnson, *Price Differentials for Butterfat in Market Milk at page 29.*

readily ascertainable through the Babcock test. The other solids are determined only through long and difficult laboratory processes that cannot practically be applied to daily receipts of milk. It has been proved, however, that those other solids consistently increase to some extent as the butterfat content increases. There is no reason to suppose that consumers receive any more benefit from the water in milk because of its being briefly housed within a cow, than from water on tap. It is what the water bears in solution that is of value. The greater amount of solids in the milk, the greater are the property rights to be recognized.

2. INFRINGEMENT OF THOSE RIGHTS THROUGH EQUALIZATION.

a. *Operation of Plan and its Effect.*

The equalization prescribed in Order No. 27 in its present working has infringed the property rights of the petitioner in its product. Prior to Federal regulation this quality milk commanded a premium. With the advent of equalization, while theoretically the producers of high test milk were not, by the terms of the Order, prevented from charging such a premium, the practical effect was to raise the price to consumers of all milk, to place dealers in a position to handle only such milk as could be sold without premiums additions, and to take away the market for the quality product and to deprive consumers of it.

Upon the requirement that the proceeds from the sale of Guernsey milk be placed with all other milk proceeds in the producer-settlement fund, as a device for equality, the following illustrates the extent to which equalization has impaired the petitioner's returns for its milk; Cows of the

Holstein breed produce 90% of the milk in the market, Guernseys 5%, according to the Secretary's contention in the brief filed in the Circuit Court herein. The evidence before the Secretary showed Holstein milk to average 3.5% butterfat content (R. 104, 108, 307, Ex. 29 and 31) and Guernsey milk 4.75% (Secretary's Findings 4 and 7; R. 104, 108, Ex. 29 and 31). Holstein cows produce one-third more than Guernseys (R. 90, 104, 299-300, 316; Ex. 28, 29, 31). 4¢ per 1/10 of 1% of butterfat for the first 3.5% is equivalent to \$1.40 per hundred pounds of milk (R. 91). The uniform price for September, 1938, the first month of the Order, was \$1.87 per hundred (Ex. 10). The uniform price for January, 1944 was \$3.43 per hundred (Market Administrator's determination). Assuming a herd of Guernsey cows producing 9000 pounds of milk, we should compute that a Holstein herd of the same size and efficiency would produce one-third more, or 12,000 pounds. Using these figures

12,000 lbs. of milk (Holstein) @ \$3.43				
(Value of first 3.5% of butterfat included)	\$411.60			
9,000 lbs. of milk (Guernsey) @ \$3.43				
(Value of first 3.5% of butter fat in- cluded)	\$308.70			
Butterfat differential an additional 1.25% of butterfat @ 4¢ per 1/10 of 1% or 50¢ per hundred	45.00	353.70		
Excess compensation received by producers of 3.5% milk			57.90	

This represents for each hundred weight of Guernsey milk at $64\frac{1}{3}\text{¢}$ disadvantage in comparison with low test milk. Thus, "in nominal equality, there may lurk actual inequalities."²

² New York State Guernsey Breeders' Co-Operative v. Noyes, 248 N. Y. 197, at page 203.

b. *Failure of 4¢ butterfat differential to meet expense of producing high test milk.*

(1) Historical background of butterfat differential.

So long as milk has been marketed on the classification price plan, it has been bought and sold by the hundred-weight.

The Babcock test for butterfat in milk was followed 22 years later by price recognition of differences in butterfat. The records of New York dealers in October, 1912, disclose that the Sheffield Farms Company began to pay a premium of 3¢ per hundred pounds of milk testing from 4.0 to 4.5 per cent. The next April Borden's Farm Products Company paid a premium of 10¢ per hundred pounds of milk testing 3.8 or higher. By 1917 both Borden's and Sheffield Farms had adopted a new system of fat differentials, taking 3 per cent as the basis and paying a premium of $3\frac{1}{2}$ ¢ per hundred pounds for each additional 1/10th per cent of fat. In October, 1917, this was raised to 4¢ per point, with 3.5 test as the base. Thus it has remained for more than 25 years on the regular grade of milk.

(2) Arbitrary 4¢ unrelated to production cost or market.

This payment of 4¢ for each 1/10th of 1% of butterfat above 3.5% and deduction of 4¢ for each 1/10th of 1% of butterfat below 3.5% prevailed without deviation when milk sold for 90¢ and \$1.00 per hundred in 1937. It prevails under the Order now, when milk in Class I commands \$3.70 per hundred-weight. Butter has held for 20¢ a pound and 90¢ a pound, but the butterfat differential remains 4¢ per point.

In the meantime, feed, equipment, labor and herd replacements—all of them directly related to the production of milk and representing greater expense in efficient high test milk production than in equally efficient low test milk production—may drop or soar. No one has ever justified the static 4¢ rate.

"The consideration which led to the establishment of the producer butterfat differential at 4¢ per point in New York and some other areas, or at other specified rates in different places, are not recorded."³

But

"* * * so long as violent changes in prices and in costs are a feature of our economy, it is a fundamental error to maintain the butterfat differential at a fixed rate per hundredweight."⁴

(3) Adjustable butterfat differentials in other milk marketing areas.

Recognition that four cents could not be the correct differential nor the equitable one throughout all shifts and changes in costs, has properly persuaded the adoption in other markets of a graduated scale of butterfat premiums to meet in some measure the higher cost of production of high test milk. In Boston and Philadelphia, for example, the Secretary of Agriculture has provided in his orders for a much higher premium for butterfat content—as high as 6.9%. The same considerations move for similar action in the New York market.

B. Plaintiff is therefore entitled to preferential treatment in the order or exemption from equalization.

³ Spencer & Johnson, *supra*, at page 23.

⁴ *Ibid.* at page 29.

1. CONSTITUTIONAL RIGHTS OF MINORITY GROUPS UNDER THE ORDER.

The Constitutional Bill of Rights was designed to safeguard a number of fundamental guaranties beyond the impact of even the most impetuous majorities. In this Order No. 27, the petitioner's,—a minority group's-right of property is violated in distinct disregard of the Constitutional guaranty in the Fifth Amendment. The privilege to vote for or against acceptance of the Order does not preclude the minority's relief from the violation of the Fifth Amendment, since that privilege alone cannot protect minority producers against unlawful exactions which might be voted upon them by majorities.

Stark v. Wickard, . . . U. S. . . . 88 Law Ed. 511.

2. CONSTITUTIONALITY OF THE ACT AND ORDER NO. 27.

The Secretary and the courts below, it is apparent, have been influenced in denying to the petitioner the relief it seeks on this erroneous assumption: the decisions in the United States vs. Rock Royal Cooperative and other cases considering the constitutionality of the Act in its general aspects render the Order in all respects constitutional.

It is not necessary to review the utter confusion in the marketing of milk which demanded Federal regulation in the 1930's. It is generally conceded that such regulation on the whole has been of benefit to producers of milk. But it does not follow that such benefit places every detail of the Order beyond judicial scrutiny.

This Court has been fully aware that particular portions of the Order would require special consideration and at no

time has dealt with the petitioner's claim nor estopped itself from dealing with it.

In *United States v. Rock Royal Cooperative*, 307 U. S. 533, the New York Guernsey Breeders' Cooperative, Inc., was permitted to file a brief *amicus curiae* in which the pendency of this litigation was referred to. The petitioner, while not presuming to urge a decision one way or another upon the questions posed by that case, indicated that problems involved in its litigation with the Secretary might come before this Court. It then requested that nothing be said by inadvertence which might be construed by lower courts as controlling the somewhat different facts of its own case. The Court complied with that request.

Let us consider just what questions of the Act and Order have been judicially treated:

None of the litigants in the Rock Royal case asserted their right to a differential under the Order. They were attacking the Act and the Order in their general aspects—the power of Congress to regulate the marketing of milk; the delegation of authority permitted under the Act, and its jurisdiction over cooperatives. This Court held the Act constitutional and the Order, in its general aspects, a valid order authorized by the Act, an instrument tending to stabilize the market and to correct chaotic marketing conditions.

H. P. Hood & Sons v. United States, 307 U. S. 593, reaffirmed the constitutionality of the act "insofar as similar issues" to the Rock Royal Case were raised.⁵ In *United States v. Whiting Milk Co.*, 21 Fed. Supp. 321, a case later consolidated with the Hood case, the District Court de-

⁵ At page 595.

terminated that many questions remained to be passed upon by this Court.

United States v. Adler's Creamery, 107 Fed. 2d 988, presented the question of subjecting handlers of intrastate milk to the provisions of the Order.

Queensboro Farm Products, Inc., v. Wickard, 137 Fed. 2d 969, dealt with the classification of milk—whether upon the basis of actual utilization or upon the basis of the form in which it was moved from the appellant's plant. The court, in deciding, pointed out that a statute constitutional as to one on a certain state of facts, may be unconstitutional as to another on a different state of facts.⁶

In Waddington Milk Co., Inc., v. Wickard, 140 Fed. 2d 98, matters of classification as between plants were determined.

Stark v. Wickard, U. S. . . . ; 88 Law Ed. 511, arose under the Boston Order, the petitioners, a minority group under the Order, challenging the provision for payments to cooperatives by the Administrators. The Supreme Court upheld the right of the petitioners to a judicial examination of their complaint.

This cooperative is here raising an issue similar to that in Stark v. Wickard—the right to question, and to be relieved from, the provisions of an order which fails to comply with the grant of authority given by the Act.

Despite the decisions favorable to the Act and the Order, therefore, legislation constitutional in its general outlines

⁶ At pages 997-978.

may yet be found to violate constitutional guaranties when considered in relation to facts presented on a subsequent trial by another litigant.

Yick Wo v. Hopkins, 118 U. S. 356.

Abie State Bank v. Bryan, 282 U. S. 765.

Nashville & etc. Co. v. Walters, 294 U. S. 405.

Averne Bay Construction Co. v. Thatcher, 278 N. Y. 222.

3. METHOD OF CORRECTION PRESCRIBED IN THE ACT.

That act itself contemplates the very relief which the petitioner seeks. Agricultural Market Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 608 e 5 (B) (ii) provides for payment to all producers and associations of producers of uniform prices * * * subject * * * to adjustments for (b) the grade or quality. But the Order has failed to grant in respect to the Guernsey Breeders' Association producers a differential "for the grade or quality of the milk" which they deliver.

The brief history of the butterfat differential showed complete absence of any explanation for choosing a fixed 4¢ per 1/10th of 1% of butterfat. It is most likely explained as the figure at which the dealers in the early period of its payment could get by. The bodily adoption of that static figure in the New York orders flaunts the very basis of the Order—that it reflect the market pulse and the producers' expense each varying month. Come high, come low, the part of the milk which gives it value—the butterfat and the proportion of other solids it represents—the part of the milk which is built from feed, careful breeding, and conditioning, is clamped at an unchanging differential. Its effect has been to compensate the producers of low test

milk, that of 3.5%, at a higher rate per point of butterfat than that applicable to milk of higher percentage. The higher the test, the smaller the actual returns per point of butterfat.

This provision in the Secretary's Order directly and largely benefits the majority of the producers at the expense of the minority. It discourages the production of high test milk and tends to reduce the volume of high test milk in the market. It operates in the same manner as if clothing manufacturers were compelled to trim their expenses so that only 15% woolen suits were put on sale.

The opinion of the Circuit Court below, 141 Fed. 2d. 805, recognizes and discusses at some length the 4¢ butterfat differential and construes or seems to construe it as one for "grade or quality" of product. It announces that this differential "necessarily works to plaintiff's advantage, since Guernsey milk has one of the highest butterfat content of any of the milk involved." That court further sanctions the continuance of 4¢ in the Order as pursuant to authority under the Act.

Such conclusions are utterly in error and in immediate need of correction. The 4¢ butterfat differential is not one for grade or quality of product. It is not a recognition of market changes or expense fluctuations. It was not placed in the Order in response to any statutory mandate as adjustment for grade or quality. The court below, however, seized upon it as a panacea and evaded a direct determination and treatment of the petitioner's complaint.

The prices directed to be fixed are those which will give the commodities for which they are established a purchas-

ing power equivalent to their purchasing power during the base period. Any fixing of prices which results in gross inequity between groups of producers, in addition to disregard of the purchasing power, fails to meet the test for proper minimum prices. Any fixing of prices the inevitable result of which is to drive from the market a superior product and to deprive the consuming public of that product fails "to protect the interest of the consumer," (Sec. 602) as well.

4. DUTY OF THE COURT UPON SECRETARY'S FAILURE TO GRANT RELIEF.

The Act, by Sec. 608c (15) (A), recognizing that an obligation imposed under an Order may be contrary to law, supplies a method of review. A person adversely affected by the terms of an order may apply for relief to the Secretary. The decision rendered by him pursuant to that application is subject to judicial review under Sec. 608c (15) (B). Where a decision of the Secretary is "not in accordance with law" a reviewing court may direct the entry of "any designated judgment to which a claimant is constitutionally entitled."

Anniston Mfg. Co. v. Davis, 301 U. S. 337.

The petitioner has failed in its effort to obtain justice and equity at the hands of the Secretary and the courts below. Relying upon what petitioner believes unsubstantial evidence and rejecting credible and substantial evidence, the Secretary has refused to find that petitioner's milk is superior, not only in butterfat, but also in flavor and vitamin A. The lower courts have upheld him. The Secretary refused to recognize as pertinent questions of relative marketability and cost of production. The Circuit Court, despite the pro-

visions of 608c (18), has sustained him by stating that "production costs and marketability are not in themselves factors to influence minimum milk prices."

Petitioner therefore asks that this reviewing court direct that milk prices to be payable to the petitioner reflect properly the grade and quality of its product.

In support of this contention there is at hand the guidance of the New York Court of Appeals, the Court of last resort in the very State wherein this issue has arisen. That Court in New York State Guernsey Breeders' Co-Operative, Inc. vs. Noyes, 284 N. Y. 197, probed this same litigant's attack upon the New York State Orders Nos. 127 and 129, similar to Federal Order No. 27, and found

1. That the Commissioner of Agriculture and Markets had

"the power to grant a differential where it is shown that there exists a distinct difference in production costs, quality or marketability of milk of one breed of cows from that of other breeds" and

2. That it was the

"Commissioner's duty to determine the existence of conditions affecting the equitable application of the proposed order, and to make appropriate modifications shown by the evidence to be necessary."

5. Grant of Relief to the Petitioner as Affecting Milk Production and Marketing

The Circuit Court, in this case, has indicated its assumption that this is a breed issue, a Guernsey versus Holstein conflict.

The breed issue is only an incident to the question before the court. Because petitioner handles only Guernsey milk, and because the Guernsey milk it handles is of the kind so adversely affected by an order which fails to provide compensation for grade or quality, petitioner has been faced with consistent efforts to defeat an otherwise justifiable attempt to obtain equity and justice under the order by accusations that relief is sought for the purpose of promoting the Guernsey breed. We ask the court to view the problem as one involving grade and quality of product divorced from any question of breed superiority or inferiority.

The Secretary has contended that a recognition of the petitioner's claim in the Order would impede the effective control of milk marketing. It must be conceded, in answer, that the payments made by the Guernsey Breeders to the Court, instead of to the equalization fund, for a period of nearly six years, have not manifestly injured the Secretary's administration of Order 27. The amount is of little significance to all the producers as a body. Judge Cooper, U. S. D. J., Northern District of New York, in an unreported decision herein, in discussing this phase of the question, said:

"The amount demanded from the plaintiff for the equalization fund will only increase the price of other producers by less than one mill per hundredweight of milk per day."

Even should the sum be substantial, it is unlikely that proper differentials to the petitioner should confound the administration of the Order, unless it be ascertained that those who stand to benefit by the inequitable distribution now directed by the Secretary, are so intent upon their gain that they would undertake to wreck the Order to prove their point.

Conclusion.

For the reasons stated at pages 7-9 of this petition and brief, supported by the discussion of relevant decisions, it is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted.

Pulaski, N. Y., July 17, 1944.

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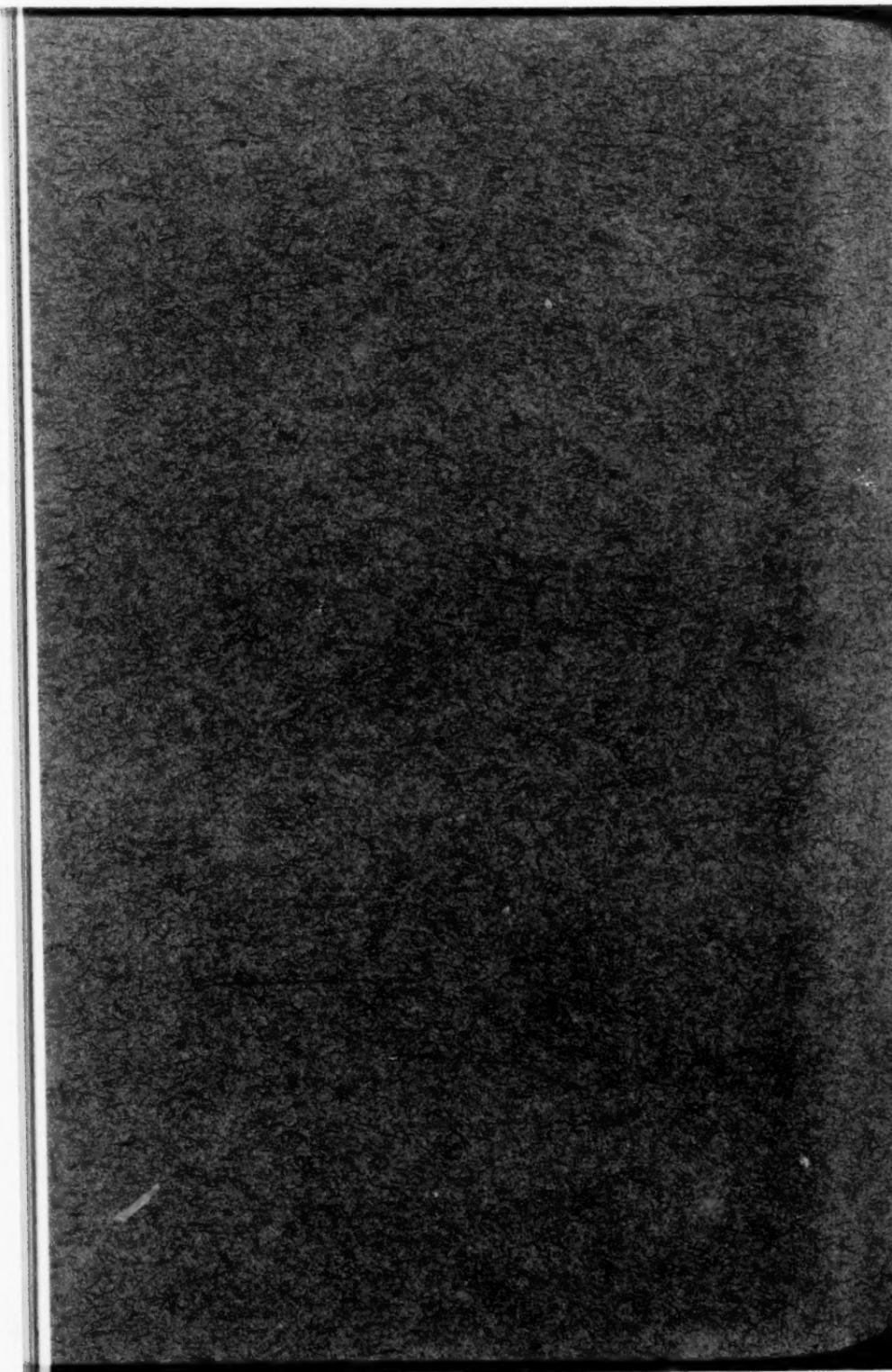
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In the summer of 1943

NEW YORK

CLAUDE

ON
STORY
DISCOURSES



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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 246

NEW YORK STATE GUERNSEY BREEDERS' CO-OPERATIVE, INC., PETITIONER

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE
OF THE UNITED STATES

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on petitioner's original complaint (R. 7-26) and the district court's opinion on petitioner's amended and supplemental complaint (R. 97-106), filed following remand of the proceedings to the Secretary of Agriculture and further hearings and findings by the Secretary, are not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 135-146) is reported in 141 F. (2d) 805.

(1)

JURISDICTION

The judgment of the court below was entered on April 17, 1944 (R. 146-147). The petition for a writ of certiorari was filed July 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. sec. 347).

QUESTION PRESENTED

Whether the ruling of the Secretary of Agriculture refusing to amend his milk marketing order (Order No. 27) so as to grant to Guernsey milk either a special differential or exemption from the equalization provisions of said order conforms to the requirements of the Agricultural Marketing Agreement Act of 1937 or violates the due process clause of the Fifth Amendment.

STATUTE INVOLVED

The pertinent portions of Section 8e of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. sec. 608e (which re-enacted and amended the Agricultural Adjustment Act as amended, 48 Stat. 31; 48 Stat. 672; 49 Stat. 750), are set forth in the Appendix, *infra*.

STATEMENT

Petitioner is a cooperative association of dairy farmers producing milk from Guernsey cows and marketing such milk in the area covered by Order No. 27 (R. 62). This order, issued by the Secretary of Agriculture under the Agri-

cultural Marketing Agreement Act of 1937, regulates the handling of milk in the New York Metropolitan marketing area and became effective September 1, 1938 (following R. 86). Shortly thereafter petitioner, pursuant to Section 8c (15) (A) of the Act, filed with the Secretary a petition requesting that it either be exempted from the equalization provisions of the order or be granted an appropriate price differential "to be paid out of the equalization pool established under such order" (R. 107). The Secretary, after a hearing, denied this petition and petitioner, as authorized by Section 8c (15) (B) of the Act, then filed in the district court a bill to review the Secretary's ruling (R. 9-11). The Secretary, by counterclaim, requested enforcement of his order against petitioner and both parties filed motions for summary judgment (R. 7). The district court denied these motions and remanded the case to the Secretary for the making of new findings and conclusions, with the right of either party to present additional evidence (R. 37).

Following remand, additional evidence was taken and the Secretary made new findings and conclusions. The Secretary found¹ among other things:

¹ The findings are not in the printed record, but are included in the record before the Secretary which is before the Court as an original exhibit. Copies of the findings have been filed with the Clerk for distribution to the Court.

Of the dairy cattle in New York State, about 90% are Holstein and between 3% and 5% are Guernsey (Fng. 5). The latter are owned by some 2,000 farmers, of which about 450 are members of petitioner and sell their milk through it (Fngs. 1, 5). Petitioner is interested in developing the Guernsey breed of cattle and in advertising Guernsey milk and it uses for this purpose the trade name "Golden Guernsey", but between September 1938 and April 1940 less than 7% of petitioner's milk was marketed under this trade name (Fngs. 2-3). Except for its somewhat yellower color, Guernsey milk not marketed under some descriptive label has no distinguishing characteristic by which it can be identified by ordinary consumers and the latter cannot distinguish it by color when it is sold in opaque containers (Fng. 4).

Guernsey milk is, on the average, appreciably richer in butterfat, slightly richer in protein and mineral elements, and considerably richer in carotene than milk from Holstein or Ayrshire cows, but it is exceeded in some of these respects by milk from Jersey cows (Fng. 4). Guernsey milk, as compared with Holstein, "is not greatly, if at all different in total vitamin A potency (including convertible carotene)" (*ibid.*). Its average butterfat content is between 4.5 and 5% (*ibid.*). Order No. 27 has, from its inception, provided a butterfat differential of 4¢ for each

$\frac{1}{10}$ of 1% by which the butterfat content of a hundredweight of milk exceeds or falls below 3.5% (Fng. 7). This differential, which is not affected by the equalization provisions of the order, affords to petitioner's milk a butterfat premium of between 40¢ and 60¢ per hundred-weight (*ibid.*).

Both before and after Order No. 27 became effective a greater percentage of petitioner's milk than of all milk on the market went into Class I uses and because of this fact petitioner prior to the order was generally able to return to its members a higher net price than non-members received (Fng. 6).

The Secretary concluded that the butterfat differential of Order No. 27 gave appropriate recognition to the provision of Section 8c (5) (B) (ii) of the statute permitting adjustment of uniform prices established by the Secretary by reason of "the grade or quality of the milk delivered." He also concluded that "Guernsey milk does not possess such special qualities and elements as to distinguish it from milk generally and as to require the Secretary to accord to it any special recognition" other than that which, by virtue of the butterfat differential of the order, he had already granted. The Secretary accordingly denied relief sought by petitioner.

Petitioner, with leave of the district court, filed an amended and supplemental complaint for

judicial review of the Secretary's second ruling (R. 58-74). The Secretary in his answer prayed, by way of counterclaim, for a mandatory injunction to require petitioner to comply with the provisions of Order No. 27 and to pay the amount due from it under the equalization provisions (section 927.7 (i)) of the order (R. 79-85).² The issues came before the court on cross motions for summary judgment. The court, holding that the Secretary's ruling was in accordance with law, entered a judgment dismissing petitioner's complaint and granting the injunction requested by the Secretary (R. 97-106, 112-114). The Circuit Court of Appeals affirmed this judgment (R. 146).

ARGUMENT

I

Petitioner contends that the Secretary's conclusion that Guernsey milk does not have such differentiating characteristics as to require exemption from his milk order or special treatment thereunder does not comply with the statutory provision that an adjustment may be allowed for

² The court had, by an order entered in February 1941, directed petitioner to establish a special bank account and to deposit therein the amount due from it under Section 927.7 (i) of the order for the delivery periods September 1938 through November 1940, and to deposit in the registry of the court amounts which should become due from it under this section for all future delivery periods, the sums so deposited to abide the final determination of the cause (R. 53, 55, 57).

“grade or quality.” (Sec. 8c (5) (A)). The evidence shows that Guernsey milk is substantially richer in butterfat and to a slight extent in some other ingredients.³ Petitioner argues that an additional differential for quality beyond that allowed for butterfat should have been granted because of the other ingredients, and that the superior quality of its milk is indicated by higher production costs and greater consumer acceptance

³ The Secretary's finding in this connection was that:

4. Milk produced by Guernsey cows is, on the average, appreciably richer in butterfat, slightly richer in protein and mineral elements, somewhat yellower in color, and considerably richer in carotene than is milk produced by Holstein and Ayrshire cows under similar conditions. It is exceeded in some of these respects only by milk produced by Jersey cows. Milk produced by Guernsey cows has a lower content of “true” or “preformed” vitamin A than does milk produced by Holstein cows under similar conditions. Milk produced by Guernsey cows and milk produced by Holstein cows under similar conditions is not greatly, if at all different in total vitamin A potency (including convertible carotene). Milk of Guernsey cows, because of its comparatively high butterfat content (on the average, between 4.5 and 5 per centum) is not so suitable for infant feeding as are milks such as Holstein, with a lower butterfat content. Except for a somewhat yellower color, the milk of Guernsey cows not marketed under the “Golden Guernsey” label or trade-mark or under some other descriptive label has no distinguishing characteristic by which it can be identified by ordinary consumers. If Guernsey milk is in opaque containers, ordinary consumers cannot distinguish it by color.

than other milk.⁴ The Secretary considered these facts but ruled that they were not sufficient to establish that Guernsey milk is of "a grade or quality" substantially superior to other milk, except as manifested in the butterfat content for which allowance has been made.⁵ The Secretary and the court below both pointed out that higher production cost does not prove exceptional *quality*, and that consumer preference may be the product of various factors other than quality, such as extensive advertising, greater butterfat content (for which the order makes allowance), superior salesmanship (R. 143).

Under the statute (Sec. 8c (15) (A)), it is obviously for the Secretary to determine whether the additional ingredients in Guernsey milk (apart from the butterfat) are of sufficient importance to allow for a special differential. Such

⁴ It should be noted that inasmuch as the Act fixes only the minimum price it does not prevent petitioner from selling its milk at a higher price if the alleged greater quality is sufficient to permit it to do so. Petitioner does not seek an additional amount to be paid directly by the handlers, which would presumably have to be added by the handlers to their resale price and paid by the ultimate consumer, but an additional payment from the equalization fund, that is from the amount available for payment to producers generally; this would enable petitioner to sell at the same price as other milk.

⁵ Petitioner states "It has been proved, however, that those other solids consistently increase to some extent as the butterfat content increases" (Pet. 13). The allowance for additional butterfat content might thus be a convenient means of taking into account these other factors also.

a question is one calling for expert administrative judgment, and under the Act the administrative decision is final if "in accordance with law" (Section 8c (15) (B), *infra* p. 16). Here the Secretary's determination is supported by substantial evidence and is entirely reasonable. It cannot be said that he erred as a matter of law in concluding that the physical differences between Guernsey and other milk, higher production costs and consumer preference did not prove that petitioner was entitled to a quality differential in addition to the one granted. In these circumstances, his decision is binding upon the courts. *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *Swayne & Hoyt Ltd. v. United States*, 300 U. S. 297, 304.

Furthermore, the question of the sufficiency of the evidence to support the administrative finding does not present an issue warranting review by this Court (*National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, 208), particularly when the administrative finding has been confirmed by two courts below. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 75; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357; cf. *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3, 4.

II

Petitioner urges that Order No. 27 deprives it of property without due process because the equalization fund provision of the order prevents it from receiving any additional return on account of the greater percentage of its milk than of other milk which goes into Class I uses. This precise objection to Order No. 27 was considered in *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 571-573, where it was argued that the pooling arrangement effected through the equalization fund was an unconstitutional deprivation of property "because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously." This Court, in upholding the constitutionality of the requirement, said (p. 572):

It [the pooling arrangement] is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing.⁶

⁶ It is pertinent to point out, in amplification of the above statement, that the equalization provisions of the order deal with the problem created by the surplus milk which must always be present in the market if the demands of consumers of fluid milk are to be adequately supplied. The burden of

Petitioner contends (Pet. 18) that the *Rock Royal* decision is not controlling because none of the litigants in that case asserted a right to a special differential. But the Secretary did not deny petitioner's application on the ground that differences in quality were immaterial, but on the ground of the insufficiency of the differences proved.

Petitioner also seems to urge (Pet. 15-16) that the butterfat differential which has remained the same since Order No. 27 was first adopted must be presumed to be arbitrary and, in its operation, violative of due process. We submit that petitioner is not in a position to raise such an issue. It is not among the grounds upon which review of the Secretary's ruling was requested (R. 67-68) and it was not presented in the administrative proceedings before the Secretary.⁷ Aside from this consideration, no factual showing is made that a butterfat differential cannot be fair unless it is correlated to cost of production. In the *Rock Royal* case this Court declared that differentials determined by the Secretary could not

this surplus is an indispensable incident of the business and must be shared equally by all engaged therein if recurrent disruptions of the industry are to be avoided.

⁷ The adequacy of the amount of the butterfat differential, which relates to milk in the marketing area generally and not just to Guernsey milk, is now before the Secretary in a proceeding involving proposed amendments to the New York milk order. See 9 Federal Register 8099, July 18, 1944.

be set aside merely on the basis of theoretical assumptions as to their unfairness. The Court said (pp. 567-568): "Such an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions * * *."⁸

III

Petitioner asserts that the New York courts have, upon similar facts and under a similar statute, ruled that Guernsey milk is entitled to a special differential.⁹ The reaching of a different factual determination upon other evidence in other litigation manifestly does not establish error in the Secretary's determination. And insofar as any question of statutory interpretation is raised in this case, the construction which the New York courts have placed upon the statute of that State involves no question of conflict with the decision in the instant case. The New York statute (Agriculture and Markets Law, Article 21, Section 258-m (3)) contains a provision, lacking in the

⁸ The butterfat differential provided for in Order No. 27 is the same as the differential in effect in the New York milk market from 1917 up to the time this order became effective (Pet. 15). Accordingly, if it were proper to resort to inference in this matter, the most natural inference to draw from the prior practice is that the differential found in the order is not arbitrary or unreasonable.

⁹ The New York cases are cited in the opinion below at R. 144-145.

Federal act, that cost of production and other factors shall be taken into account in fixing milk prices. As the court below said, "the governing law there is somewhat different, the views of the various judges in New York appear to be quite divided, and as yet there has been no final disposition of the issue" (R. 144).

CONCLUSION

The decision below is correct and there is no conflict of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Special Assistants to the Attorney General.

AUGUST 1944.

APPENDIX

Agricultural Marketing Agreement Act of 1937,
50 Stat. 246, 7 U. S. C. sec. 608c (which reenacted
and amended the Agricultural Adjustment Act as
amended, 48 Stat. 31; 48 Stat. 672; 49 Stat. 750):

SEC. 8c.

* * * * *

(5) In the case of milk and its products,
orders issued pursuant to this section shall
contain one or more of the following terms
and conditions, and (except as provided in
subsection (7)) no others:

(A) Classifying milk in accordance with
the form in which or the purpose for which
it is used, and fixing, or providing a method
for fixing, minimum prices for each such
use classification which all handlers shall
pay, and the time when payments shall be
made, for milk purchased from producers or
associations of producers. Such prices shall
be uniform as to all handlers, subject only
to adjustments for (1) volume, market, and
production differentials customarily applied
by the handlers subject to such order, (2)
the grade or quality of the milk purchased,
and (3) the locations at which delivery of
such milk, or any use classification thereof,
is made to such handlers.

(B) Providing:

* * * * *

(ii) for the payment to all producers and
associations of producers delivering milk to
all handlers of uniform prices for all milk
so delivered, irrespective of the uses made
of such milk by the individual handler to

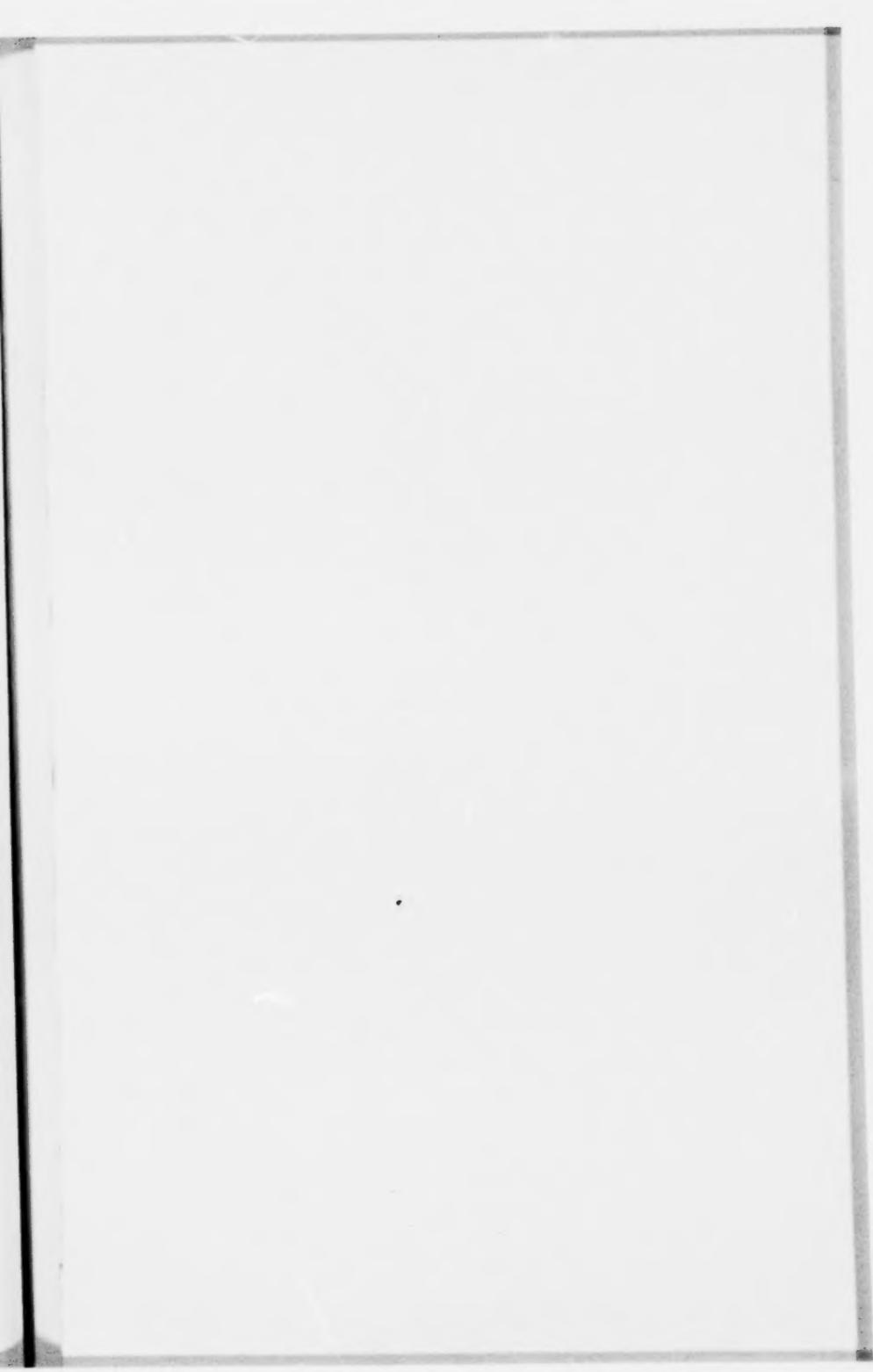
whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

Subsection (15) of Section 8e provides in part:

15. (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States * * * are hereby vested with jurisdiction in equity to review such ruling, * * * * * If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. * * *





IN THE

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(19)

Supreme Court of the United States

October Term, 1944.

No. 246.

NEW YORK STATE GUERNSEY BREEDERS'
CO-OPERATIVE, INC.,

Petitioner,

against

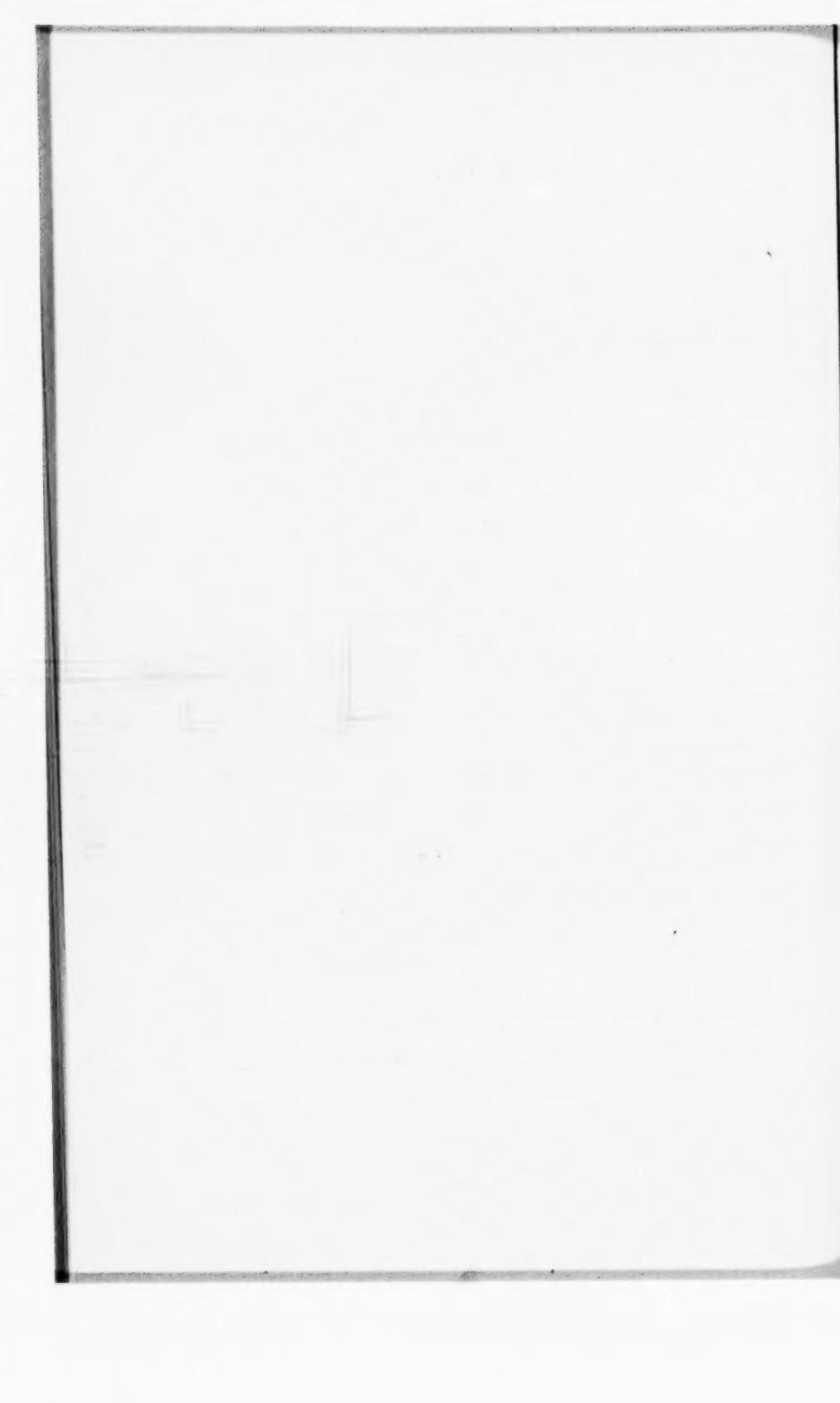
CLAUDE R. WICKARD, Secretary of Agriculture of the
United States of America.

PETITIONER'S REPLY BRIEF.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS, SECOND CIRCUIT.

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IN THE

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NEW YORK STATE GUERNSEY BREEDERS'
CO-OPERATIVE, INC.,

Petitioner,

v.

CLAUDE R. WICKARD, Secretary of Agriculture of the
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

For a reply to the brief of respondent, Claude R. Wickard, Secretary of Agriculture of the United States, in opposition to the petition for a Writ of Certiorari herein, the petitioner, New York State Guernsey Breeders' Co-Operative, Inc., respectfully submits the following:

Argument.

The respondent has attacked the contention of the petitioner on the basis of

(1) The authority of the Secretary to decide the question of granting differentials in the order "if in accordance with law".

(2) The holding of the Court in the case United States v. Rock Royal Co-operative, Inc., 307 U. S. 533, 571-573; the estoppel against this petitioner's raising the issue of the inadequacy of the butterfat differential; and the lack of proof that a butterfat differential cannot be fair unless correlated to the cost of production.

(3) The inapplicability of the New York court's construction of the New York statute to the construction of the Federal Act.

I.

Authority of the Secretary.

The Secretary has found that Guernsey milk is appreciably richer in butterfat, slightly richer in protein and mineral elements, somewhat yellower in color and considerably richer in carotene than that of Holstein and Ayrshire cows under similar conditions. Even disregarding appearance and sales appeal, Guernsey milk possesses those substances which give it value as a product, in greater abundance than milk from the breeds predominating in the milk market. That some persons contend it may be unsuitable for infant feeding should not detract from the value of Guernsey milk any more than it would from the value of caviar if considered with respect to use for the same purpose.

In the face of the Secretary's recognition of the relative merits of petitioner's milk, it is his refusal to accord an adjustment for "grade or quality" which contravenes the statute. It is the Secretary's insistence that the straight butterfat differential of 4¢ for each tenth of a point fulfills the requirement of statutory adjustments, which the petitioner submits is not "in accordance with law."

The respondent has cited a number of cases as proof that the Secretary's decision is a final and conclusive disposition of evidence. It is to be perceived, however, that the majority of the respondent's cases sprang from the National Labor Relations Act.

"In that Act (49 Stat. 449, Sec. 10 (3) 29 U. S. C. 160) Congress provided, 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' "

National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206.

Rochester Telephone Corp. v. United States, 307 U. S. 125, involved a decision of the Federal Communications Commission under the Communications Act of 1934 (June 19, 1934, C. 652, § 609, 48 Stat. 1105, U. S. C. Title 47), which provides that a review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. (U. S. C., Title 47, Sect. 402(e).)

Swayne & Hoyt v. United States, 300 U. S. 297, involved an order of the Secretary of Commerce based upon findings of the Shipping Board Bureau. Originally power to make orders relative to rates was vested in the United States

Shipping Board under the Shipping Act, 1916 (Sept. 7, 1917, C. 451, § 44; July 15, 1918, c. 152, § 4, 40 Stat. 903, U. S. C., Title 46, Chap. 23, Sect. 817). Its powers were transferred to the Department of Commerce on June 10, 1933, by Executive Order No. 6166. The Shipping Act, § 31, U. S. C. Title 46, Chap. 23, Sect. 830, provides that the venue and procedure in the United States courts shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission. The Interstate Commerce Act provides that in suits to enforce orders, the findings and orders of the commission shall be *prima facie* evidence of the facts therein stated (U. S. C. Title 49, Chap. 1, Sect. 16 (2)). Orders of the Interstate Commerce Commission have been held by this court to be

“quasi-judicial and only *prima facie* correct insofar as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, the carrier is, by § 16 of the act, given its day in court and the right to a judicial hearing.”

Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 258.

In Swayne & Hoyt v. United States, *supra*, the court did consider the evidence and affirmed because it found substantial evidence to support the order of the Secretary of Commerce.

In the Agricultural Marketing Agreement Act the remedy for injury from a provision of the order is worded: “After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.”

(7 U. S. C. Sec. 608 e. (15)).

The determination of whether or not a course of conduct or prescription for one, is in accordance with law is peculiarly a judicial function and always has been.

Respondent clearly confuses the rule applicable where decisions of an administrative body are by the act made conclusive and that applicable where decisions of a body or officer are made under an act which preserves the right of judicial review.

Respondent continues, page 9 of answering brief: "Furthermore, the question of the sufficiency of the evidence to support the administrative finding does not present an issue warranting review by this Court * * * particularly when the administrative finding has been confirmed by two courts below."

That the Court does not speak so forcibly about shutting its ears and reserves a right of review is illustrated in these sentences from the Secretary's cited cases: "Since the court below has confirmed the findings of the Board there is no need to review the evidence *in detail*" (Italics, the petitioner's.) "It is *plain* that the employer * * *." "It is *clear* that * * *." "And it is *evident* that * * *."

International Association of Machinists, Tool & Die Makers Lodge No. 35 v. National Labor Relations Board, 311 U. S. 72, at page 75.

"and after hearings, the Board found jurisdictional facts which need not be repeated and *other facts which may be shortly summarized as follows:*"

National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, at page 352.

Pick Mfg. Co. v. General Motors Corp., 299 U. S. 3, states no rule which precludes a review of the facts. It merely reiterates the recognized rule that where two courts have concurred this court will accept the findings unless clear error is shown.

In the instant case clear error is apparent. The courts below have sustained respondent as to a determination

which ignores a provision of the Act providing for an adjustment for grade or quality of product and apparently upon the erroneous theory that the determination of respondent is binding upon the courts. In so doing they have deprived petitioner of relief against a determination which, if enforced, will deprive petitioner of its property without due process of law.

II.

Equalization and Adjustment for Grade or Quality.

1. (a) The Agricultural Marketing Agreement Act itself (7. U. S. C. 608c (5) (B)) undermines the respondent's defense that *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 571-573, settled once and for all not only the constitutionality of the equalization fund but also the status of petitioner's milk. Orders "shall contain terms and conditions

(b) Providing:

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, *irrespective of the uses made* by the individual handler to whom it is delivered; subject, in either case, only to adjustments for * * * (b) the *grade or quality of the milk delivered.*"

The Rock Royal decision upheld "irrespective of the uses made." It did not set the demarcation of "adjustments for grade or quality of the milk delivered."

2. The respondent would require of the petitioner in its appeal to the Secretary for review of his ruling an exact

formula for correcting an injury. One basis for review was that adjustment for grade or quality had not been granted. Consideration of a butterfat differential was certainly inherent in petitioner's objection to the promulgated order.

Whether the present butterfat differential is or is not an adjustment for grade or quality within the meaning of the Act has been an issue in this litigation from its inception. Upon what theory it can be urged that petitioner did not raise the issue before the Secretary is not understandable to petitioner. In its amended and supplemental complaint it set forth in paragraph 9, R. 64 (Fol. 192) the history of the 4¢ butterfat differential provided for in the Order. In paragraph 20, R. 67-68, it clearly set forth that order provisions, which included the 4¢ butterfat differential provision, failed to provide as to plaintiff adjustment for the grade or quality of the milk delivered. The evidence has fully sustained petitioner's claim and there is no substantial evidence to sustain the Secretary's contrary determination.

3. That the butterfat differential cannot be fair unless related to the cost of production, and with that, to the conditions of the market, is forthrightly proved by the amendments now proposed by the Dairy and Poultry Branch, Office of Distribution of the War Food Administration. These amendments would, in conformity with other marketing areas' recognition of the relation of costs and prices of butterfat and solids, grant a varying butterfat differential which under present market conditions would raise the 4¢ to approximately 7¢.

Respondent's proposed amendments to Order 127 mentioned as a footnote at page 11 of the answering brief argue in the strongest manner possible the merit of this applica-

tion and clearly indicate that petitioner has since the inception of the order been deprived of its property without due process.

Prior to the promulgation of order number 27 the milk of petitioner enjoyed a higher than average class I utilization or sale to the public as fluid milk. This was directly caused by "the grade and quality" of its milk. If petitioner was not entitled to a special differential under the order to compensate it for the "grade and quality" of its product then petitioner was entitled to exemption under the order pursuant to the provisions of Section 611 of Title 7 U.S.C.A. and petitioner's milk should have been excluded by the Secretary of Agriculture from the operation of the provisions of that chapter.

The petitioner does not have to invoke theory to show the unfairness of a fixed and changeless 4¢ butterfat differential. Orders in other marketing areas included butterfat differentials approximating the present proposals of the Dairy and Poultry Branch. The long history of the 4¢ butterfat differential in milk pricing covered some extremely chaotic marketing periods. There was and is nothing to commend such rigidity of rate.

As a further, and it seems to petitioner a conclusive indication that it was not the intent of Congress that the arbitrary 4¢ per point butterfat differential, discussed at pages 15 and 16 of petitioner's main brief, should be seized upon by the Secretary as an adjustment for grade or quality, we wish to direct the court's attention to the provisions of 608e, 5 (B) (ii) of the act. Under sub-section (a) adjustments "for volume, market and production differentials" are specified to be those "customarily applied by the handlers subject to such order". This 4¢ butterfat dif-

ferential, as has been shown, was customarily applied by handlers in computing the price of milk, was applicable to all milk, and applied in reduction of price where milk contained less than 3.5% of butterfat and in increase of price where it contained more than that percentage. It was a part of the existing plan of pricing long used in the industry. Yet subsection (b), without adverting to differentials "customarily applied by handlers", made provision for adjustments for "the grade or quality of the milk delivered". There could be no clearer indication that something other than an existing 4¢ per point feature of the existing pricing plan was intended when the Secretary was directed to make adjustments for "grade or quality".

III.

Applicability of Construction of New York Statute.

To refute respondent's contention that the New York Guernsey cases have no bearing here, since the New York Statute provides that cost of production and other factors shall be taken into account in fixing milk prices, petitioner directs this consideration: The New York statute, profiting from the example and initiative of the Federal Act, merely says more clearly what the Federal Act certainly implies. "It is hereby declared to be the policy of Congress

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period " (7 U.S.C. 602 (1)).

Just what articles and commodities do dairy farmers buy, if not feed, grain, milking machines and labor? Just what are those if not a part of the cost of production?

We do contend that it has been established that petitioner's Guernsey milk has proven qualities other than butterfat content, that it costs more to produce that milk and that the character of proof was such that the Secretary was obligated to take those elements into consideration in resolving the issue as to the proper adjustment. However, leaving those elements out of consideration, there still is no adjustment for grade or quality of product in the existing order when interpreted in the light of the act under which it was promulgated. The order, as has been demonstrated in petitioner's brief submitted with the petition, penalizes rather than compensates petitioner for producing milk of high butterfat content.

Conclusion.

It is therefore respectfully submitted that the petition for a Writ of Certiorari in the instant case should be granted as prayed for in the petition herein.

Dated: Pulaski, New York, August 31, 1944.

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